

82-1365

No.

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONTINENTAL INSURANCE COMPANY,
Petitioner,

VS.

SISTER RICCARDA MOSELEY, EXECUTRIX OF THE
ESTATE OF AUDRAIN MAVIS-MARIE OLIVER,
Respondent.

CONTINENTAL INSURANCE COMPANIES,
Petitioner,

VS.

JEAN HOOPER STEVENS and AUDREY OLIVER,
Respondents.

On a Writ of Certiorari to the
Supreme Court of Nevada

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does compliance only in the strictest most technical sense with the statutory requirements for providing Notice to Creditors of the pendency of an estate proceeding satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution?

2. Was the publication of Notice to Creditors further made inadequate and insufficient by the Executrix's explicit knowledge that Petitioner was a creditor of the estate?

PARTIES TO THE PROCEEDING BELOW

On the consolidated cases to the Supreme Court of Nevada, the following are the parties to the proceedings:

Petitioner, Continental Insurance Company; Sister Riccarda Moseley, Executrix of the Estate of Audrain Mavis-Marie Oliver, Respondent; and Petitioner, Continental Insurance Companies; Jean Hooper Stevens and Audrey Oliver, Respondents.

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OPINIONS BELOW

The opinion of the Nevada Supreme Court is printed in Appendix F hereto, and is reported at 98 Nevada Advance Opinion 142 and 653 P.2d 158 (1982). The Order of the Supreme Court of the State of Nevada is printed in Appendix E hereto.

The Orders and Decision of the Second Judicial District Court of the State of Nevada in and for the County of Washoe are printed in Appendix A, B, C, and D.

JURISDICTION

The Judgment printed in Appendix F, attached hereto, which Petitioner seeks to have reviewed is dated November 12, 1982 and was entered on November 12, 1982. The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America
Amendment Fourteen, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On March 28, 1978, Audrey M. Oliver was indicted by the Carson County Grand Jury of seven counts of aiding and abetting forgery, and on one count of embezzlement. After a plea of not guilty, she was tried and convicted of all charges. She was sentenced to the Nevada State Penitentiary to serve 3 years imprisonment on each of the fifteen counts, each of the terms to run concurrently with each other. The time for filing Notice of Appeal expired on February 18, 1979.

On July 30, 1979, the Continental Insurance Companies commenced an action in the Second Judicial District Court of Washoe County, Case No. 79-5679, Department No. 7, entitled *The Continental Insurance Companies v. Jean H. Stevens and Audrey Oliver*, to recover the monies which were required to be paid to the State of Nevada pursuant to the bond written by the Continental Insurance Companies in favor of the State of Nevada.

At the initiation of the lawsuit, Continental Insurance Companies moved the court for an Order of Attachment, which was granted, and the sum of \$19,850.00 was attached by the Sheriff of Washoe County against an account maintained by Audrey M. Oliver at First Federal Savings and Loan Association, Reno, Nevada.

On August 31, 1980, Audrey M. Oliver died in Carson City, Nevada, and on the 12th day of September 1980, Sister Riccarda Moseley, in Case No. 80-7905, petitioned the Second Judicial District Court for Letters Testamentary and for Summary Administration of the estate of Audrain Mavis-Marie Oliver (ROA 1-3). Also on September 12, 1980, Sister Riccarda Moseley filed a General Notice (ROA 4) with the Clerk of the Court.

Sister Riccarda Moseley was appointed Executrix of the estate by Order dated September 26, 1980 (ROA 5-6); and on September 30, 1980, Notice to Creditors was filed (ROA 7) and was first published on the 4th day of October, 1980, in the Reno Evening Gazette (ROA 8).

On December 2, 1980, Counsel Robert Fry caused the mailing of a copy of the Notice of Suggestion of Death Upon The Record to Lawrence J. Semenza, counsel for Continental Insurance Companies. On December 3, 1980

(the day upon which the 60-day period within which to file claims against the estate of Audrain Mavis-Marie Oliver expired), the Notice of Death Upon the Record was received at Lawrence J. Semenza's office.

This was the first notification of the death of Audrey Oliver and the first information that Ms. Oliver used or had another name other than that under which she was prosecuted by the Carson County District Attorney, convicted, and sentenced to imprisonment in the Nevada State Penitentiary, and was sued under in the case of *The Continental Insurance Companies v. Jean H. Stevens and Audrey Oliver*.

On December 5, 1980, (2 days after the cut-off date for filing claims) Lawrence J. Semenza, on behalf of the Continental Insurance Companies filed a Claim with the Clerk of the Second Judicial District Court, Washoe County, in the estate proceedings of Audrain Mavis-Marie Oliver for the sum of \$19,850.00 (ROA 9-15).

On December 9, 1980, a Motion For Substitution of Sister Riccarda Moseley as Executrix of the estate of Audrain Mavis-Marie Oliver for Audrey Oliver was filed in the case of *The Continental Insurance Companies v. Jean Hooper Stevens and Audrey Oliver* (ROA 16-18). On December 22, 1980, an Opposition to Plaintiff's Motion for Substitution and a Cross-Motion For Dismissal With Prejudice was filed by Audrey Oliver's counsel, Robert Fry (ROA 19-21).

On January 6, 1981, Counsel for the Continental Insurance Companies filed a Reply to Defendant's Opposition to Plaintiff's Motion For Substitution of Parties and Opposition to Defendant's Cross-Motion to Dismiss With

Prejudice (ROA 57-68). On January 20, 1981, Counsel for the Continental Insurance Companies filed a Request For Submission of Motion.

On January 6, 1981, Continental Insurance Companies filed, in the Matter of the Estate of Audrain Mavis-Marie Oliver, a Motion to Compel the Executrix To Cause the Publication of Notice to Creditors (ROA 22-56).

On January 15, Counsel for the estate of Audrain Mavis-Marie Oliver, filed with the Clerk of the Court the Executrix' Opposition to the Motion of Continental Insurance Companies to Compel the Executrix to Cause the Publication of Notice to Creditors (ROA 69-72).

On January 23, 1981, the Continental Insurance Companies' Reply to the Executrix's Opposition was filed with the Clerk of the Court (ROA 73-77) and on February 17, 1981, the Honorable Grant L. Bowen, District Judge, Department No. 1, Second Judicial District Court of the State of Nevada, Washoe County, rendered his Decision (ROA 78-79) denying the Continental Insurance Companies' Motion to Compel the Executrix to Cause the Publication of Notice to Creditors.

On February 26, 1981, the Honorable Grant L. Bowen filed his Order (ROA 80) and a Notice of Entry of Order was filed on the same day by Counsel for the Executrix of the estate, Bruce D. Roberts.

Notice of Appeal (ROA 81-82) was filed March 27, 1981, appealing from the Order entered by Judge Bowen on February 26, 1981, in Case No. 80-7905.

On March 13, 1981, Continental Insurance Companies, by and through their Counsel, Lawrence J. Semenza, filed

with the Supreme Court of the State of Nevada an Original Petition for Writ of Mandamus, Case No. 13205. On August 26, 1981 the Nevada Supreme Court denied Continental Insurance Companies' Petition for Writ of Mandamus.

On May 5, 1981, the Honorable Peter I. Breen, District Judge, Dept. No. 7, Second Judicial District Court of the State of Nevada, Washoe County, ordered that Plaintiff's Motion of Substitution be denied and Defendant's Cross-Motion to Dismiss should be granted in case No. 79-5679.

A Notice of Entry of Order was filed by Counsel for Defendant Audrey Oliver on May 12, 1981.

In the case of *The Continental Insurance Companies v. Jean Hooper Stevens and Audrey Oliver*, Case No. 79-5679, Continental Insurance Companies, on May 18, 1981, filed a Notice of Appeal to the Supreme Court of the State of Nevada from Judge Breen's Order and the Designation of Portions of the Record and Evidence on Appeal was filed May 18, 1981.

On May 18, 1981, The Continental Insurance Companies filed a Motion to Alter, Amend or Reconsider the Court's Order filed on May 6, 1981. On May 18, 1981, The Continental Insurance Companies filed a Motion to Stay the Dismissal of the Complaint against Audrey Oliver pending appeal. On June 26, 1981, the Honorable Peter I. Breen rendered his decision denying the Continental Insurance Companies' Motion to Reconsider.

On August 20, 1981 the Supreme Court of the State of Nevada ordered consolidation of Case No. 13308 and Case No. 13432 for the purposes of review. On November 12,

1982 the Supreme Court of the State of Nevada affirmed the District Court's Order denying Appellant's Motion for Substitution, Case No. 13432 and Order denying Appellant's Motion to Publish Notice and declaring Appellant's claim forever barred, Case No. 13308. On the 28th of December, Notice of Petition for Writ of Certiorari was given by Continental Insurance Company to the Supreme Court of the State of Nevada.

On or before February 11, 1983, Counsel for Petitioner, Continental Insurance Company, filed with the Supreme Court of the United States of America the Petition for Writ of Certiorari to review the final judgement of the Supreme Court of the State of Nevada entered on November 12, 1982.

REASONS FOR ALLOWANCE OF THE WRIT

I

INTRODUCTION

The Second Judicial District Court of the State of Nevada respectfully denied Continental Insurance Company's Motion for Substitution of the Executrix, Sister Riccarda Moseley for the decedent and also the Motion to Compel the Publication of Notice to Creditors. A fundamental requirement of the Due Process Clause of the Fourteenth Amendment, in any proceeding that is to be accorded finality, is notice reasonably calculated under all circumstances to reach the interested parties.

"This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 at 317, 70 S.Ct. 652 at 658, 94 L.Ed. 865 (1950).

In the disposition of the Estate of Audrain Mavis-Marie Oliver there was lacking, however, that fundamental principal of "fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

Petitioner, Continental Insurance Company, was a *known* creditor to the Executrix, currently represented by a *known* counsel, with a *known* business address in Reno, Nevada. As Continental Insurance Company's legal representative, Counsel had a right to receive reasonable notice of the probate proceeding of Audrey Oliver's estate.

"The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder v. City of New York*, 371 U.S. 208 at 213, 214, 83 S.Ct. 279 at 282, 9 L.Ed.2d 255 (1962).

In the instant case publication was the only type of notice given in the probate proceeding.

The Notice to Creditors which was filed and published in the Reno Evening Gazette listed the estate as that of "Audrain Mavis-Marie Oliver." This was a name that was not immediately recognizable. All previous lawsuits and criminal actions were brought against "Audrey Oliver."

Lack of sufficient notification in violation of the Due Process Clause of the Fourteenth Amendment and the inadequacy of any notification using such a dissimilar name are extenuating circumstances upon which a judgment in favor of Petitioner should have been issued. Reversal of the affirming decision of the Supreme Court of the State

of Nevada should be rendered in order to better serve the ends of justice. For these reasons, therefore, a Writ of Certiorari should be granted by this Supreme Court of the United States of America so that review and rectification can be allowed.

II

NOTICE AS REQUIRED BY THE FOURTEENTH AMENDMENT

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that the person be "properly and seasonably notified" of a pending action. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877). Although the letter of the law was allegedly followed by the Estate of Audrey Oliver in conformance to NRS 145.050 (see Appendix G), it may not be said that either an adequate or timely notice was given regarding known creditor, Continental Insurance Company. Mere compliance with a statutes does not afford notice. *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956). In a case on point, *Walker v. City of Hutchinson, Kansas*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956), publication did not measure up to the quality of notice required under the Due Process Clause of the Fourteenth Amendment in a condemnation action against a land owner where his name and address were known.

As was stated in *Mullane, supra*, due process requires that a reasonable method of notification, given the individual circumstances, must be supplied to those involved named parties. The black letter law definition of a "reasonable method" of notification is *that method which given the circumstances and resources and nature of the court and pending suit is most likely to reach the other parties.*

Mere publication without anything else should not be held as per se sufficient notification to a known party. The primary modern use of publication is as an auxiliary form of notification for actions in rem.

Historically, adequate notice for in rem cases could be given by constructive service, for example, publication. However, increased sensitivity to due process concerns, have led modern courts to require the same kind of reasonable notice that is needed for in personam actions. Moreover, it may be stated that a judgment rendered without reasonable notice to a person will be unenforceable against that person.

Notice is required in a plethora of situations. In civil litigation notice is mandated where property interests are disturbed, before assessments are made and before penalties are assessed. The requirement of notice which is engraved in this Court's concept of due process is based on the fact that ". . . penalty or forfeiture might be suffered for mere failure to act." *Lambert v. People of the State of California*, 355 U.S. 225 at 230, 78 S.Ct. 240 at 243, 2 L.Ed.2d 228 (1958).

Petitioner, an adverse party, a creditor to the Estate of Audrain Mavis-Marie Oliver has forfeited his claim for his unknowing lack of timely filing. The holding of *Mullane*, *supra*, however, sought to remedy this injustice by stating that the required notice must be reasonably certain of reaching especially those parties most interested in filing a claim *against* the estate.

"When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, U.S. at 315, S.Ct. at 657.

The publication of Notice to Creditors regarding the Estate of Audrain Mavis-Marie Oliver does not *clearly* inform such creditors that this is the estate of one, Audrey Oliver. It is common practice that when a person is known under two or more names that all names be listed in any published legal notice. This procedure would certainly have been the more equitable format for actual accomplishment of notice according to the rule dictated in *Mullane*.

III SUMMATION

The facts of each case must be analyzed to determine the permissible ways in which notice may be given. The key is always what is reasonable under the circumstances. Personal service of written notice was the only adequate notice in this proceeding under the requirement of the Due Process Clause of the Fourteenth Amendment. The rule of personal notification when the name and address of the party affected is known

“was applied in *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296, 73 S.Ct. 299, 301, 97 L.Ed. 333, where the Court pointed out that ‘[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,’ and that ‘[i]ts justification is difficult at best.’” *Schroeder, supra*.

We think that it was not constitutional to simply publish Notice to Creditors when Petitioner was a known creditor to the Executrix. It was not reasonable to expect Continental Insurance Company to file any claims within the statutory time period when actual notice of death was received personally by Counsel only on the last day for filing. In addition to these facts, every effort was made to determine if a probate proceeding had ever been commenced.

Due process mean fair and equitable procedure. The law has always represented substantial justice, and a party should never be allowed to use a procedure in a way which would eliminate the opposition's legal claim. To meet the constitutional test of reasonable notice, statutes and rules should require that a bona fide good faith attempt be made to give actual notice to the involved parties. The Notice by Publication which was promulgated by Respondent fails the constitutional test of justness required by the Fourteenth Amendment. In conclusion, it must be stated that the Due Process Clause of the Fourteenth Amendment, and the extenuating circumstances of the case at hand warrant the issuance of a Writ of Certiorari to review the decision of the Supreme Court of the State of Nevada.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

DATED: This 1st day of February, 1983.

LAWRENCE J. SEMENZA
Counsel for Petitioner

(Appendices follow)

APPENDIX A

**In the Second Judicial District Court
of the State of Nevada
in and for the County of Washoe**

Case No. 80-7905

Dept. No. 1

**In the Matter of the Estate of
Audrain Mavis-Marie Oliver,
Deceased.**

[Filed Feb. 26, 1981]

Order

The motion of Continental Insurance Companies to compel the executrix to cause the publication of notice to creditors, having been submitted to the court for decision, and the court having considered the points and authorities submitted by the movant and the opposition of the executrix thereto, and the court having on February 17, 1981, filed its written decision herein, it is hereby

Ordered that the motion of Continental Insurance Companies to compel the executrix to cause the publication of notice to creditors be, and the same hereby is, denied, and the claim of Continental Insurance Companies filed in this proceeding on December 5, 1980, is forever barred.

Dated this 26th day of February, 1981.

**Grant L. Bowen
District Judge**

APPENDIX B

In the Second Judicial District Court
of the State of Nevada
in and for the County of Washoe

No. 80-7905

Department No. 1

In the Matter of the Estate of
Audrain Mavis-Marie Oliver,
Deceased.

[Filed Feb. 17, 1981]

Decision

The facts in this matter are fairly simple.

An action was filed by Continental Insurance Company on July 30, 1979, to recover moneys it had been required to pay to the State under a bond written by the Insurance Company.

The defendant in that action, Audrey M. Oliver, died on September 12, 1980. Sister Riccarda Moseley petitioned and obtained Letters Testamentary. Summary Administration was ordered on September 26, 1980. Publication of Notice to Creditors was started with Proof of Publication filed on October 20, 1980.

Mr. Robert Fry, representing Audrey M. Oliver, filed in that action a suggestion on the record of her death on December 2, 1980.

Continental Insurance Company then filed a Creditor's Claim on December 5, 1980, two days after time to file creditor's claims had expired.

. . .

It now wants me to compel the Executrix to republish a "Notice to Creditors" so as to escape the effect of a late filing.

Apparently Rule 25 of NRCP contains no time limit within which a party may file a suggestion of death when one of the parties to a civil action dies, and it is thus left up to the discretion of the interested party when such suggestion is or ought to be filed.

There is nothing in the Nevada Revised Statutes which authorizes or directs a republication under any circumstances, although publication has been ordered in a few instances where the name of the decedent was wholly misspelled. Since Continental Insurance Company did not file its claim within sixty (60) days, it has no recourse as its claim under Nevada probate law is barred forever.

Dated this 13th day of February, 1981.

Grant L. Bowen
District Judge

APPENDIX C

In the Second Judicial District Court
of the State of Nevada
in and for the County of Washoe

No. 79-5679

Dept. No. 7

The Continental Insurance Companies,
Plaintiff,

v.

Jean Hooper Stevens and Audrey Oliver,
Defendants.

[Filed May 6, 1981]

Order

I think plaintiff's Motion for Substitution should be denied and the Motion of defendant to dismiss should be granted.

I think plaintiff's Motion was untimely filed under NRS 145.060(2) and that plaintiff has not shown good cause for excuse from the sixty day time limit.

It IS SO ORDERED.

DATED this 5th day of May, 1981.

Peter I. Breen
District Judge

APPENDIX D

In the Second Judicial District Court of the
State of Nevada in and for the
County of Washoe

No. 79 5679

Dept. No. 7

The Continental Insurance Cos.,
Plaintiff,

v.

Jean Hooper Stevens and Audrey Oliver,
Defendants.

[Filed June 29, 1981]

Order

The Motion for Reconsideration should be denied. I think that a supersedeas bond is required by Rule 62(d), which has not been provided.

A stay will be considered when the plaintiff fully complies with Rule 62.

IT IS SO ORDERED.

Dated this 26th day of June, 1981.

PETER I. BREEN
District Judge

APPENDIX E

In the Supreme Court of the State of Nevada

No. 13205

The Continental Insurance Companies,
Petitioner,

vs.

The Second Judicial District Court of the
State of Nevada;

The Honorable Grant L. Bowen, District Judge;

The Honorable Peter I. Breen, District Judge;

Bruce D. Roberts; Robert J. Fry; and Judi Bailey,

Clerk of the Second Judicial District Court of the

State of Nevada,

Respondents.

[Filed Aug. 26, 1981]

Order Denying Petition for Writ of Mandamus

The order which petitioner is challenging in this original proceeding in mandamus is presently pending before this court on direct appeal. A writ of mandamus is not appropriate under these circumstances. *See* NRS 34.170; *Heilig v. Christensen*, 91 Nev. 120, 532 P.2d 267 (1975). Accordingly, the petition is denied.

It is so ORDERED.

/s/ GUNDERSON, C.J.

/s/ BATJER, J.

/s/ MOWBRAY, J.

cc: Lawrence J. Semenza, Esq.

Messrs. Cooke, Roberts & Reese

Judi Bailey, Clerk

APPENDIX F

In the Supreme Court of the State of Nevada

No. 13308

Continental Insurance Company,
Appellant,
vs.

Sister Riccarda Moseley, Executrix of the Estate of
Audrain Mavis-Marie Oliver,
Respondent.

No. 13432

The Continental Insurance Companies,
Appellant,
vs.

Jean Hooper Stevens and Audrey Oliver,
Respondents.

[Filed Nov. 12, 1982]

Consolidated appeal from district court's order denying appellant's motion for substitution (No. 13432), and order denying appellant's motion to publish notice and declaring appellant's claim forever barred. (No. 13308). Second Judicial District Court, Washoe County; Grant L. Bowen, Judge (13308); Second Judicial District Court, Washoe County; Peter I. Breen, Judge (13432).

Affirmed.

Semenza and Lutfy, Reno,
for Appellant.
Cooke, Roberts & Reese,
and Fry, Fry & Thara, Reno,
for Respondents.

Opinion

Per Curiam:

In August of 1980, Audrain Mavis-Marie Oliver died testate, naming Sister Riccarda Moseley as executrix. Sister Riccarda Moseley, through her attorney, petitioned for probate of the will and for summary administration. On September 26, 1980, the district court entered an order admitting the will to probate, directing the issuance of letters testamentary and ordering summary administration.

On September 30, 1980, letters testamentary were issued and the notice to creditors was filed. The notice to creditors was published in the newspaper on October 4, 9 and 14, 1980, and the proof of publication was filed on October 20, 1980.

At the time of the decedent's death, there was a civil action pending against her which had been filed by appellant Continental. The action was filed against the decedent under the name of Audrey Oliver. Appellant received notice of Oliver's death on December 3, 1980, the last day for filing claims against her estate. However, appellant filed its claim (the subject of the civil proceeding) against Oliver's estate on December 5, 1980, two days after the time for filing claims had expired.

Subsequently, on December 9, 1980, appellant filed a motion in the civil proceeding seeking to substitute respondent Sister Riccarda Moseley for Audrey Oliver. The lower court denied appellant's motion on the ground that the motion was not timely filed. Appeal No. 13432 is from the denial of this motion.

On January 6, 1981, appellant Continental filed in the probate proceeding a motion to compel the executrix to

publish notice to creditors. The district court entered its order denying Continental's motion to compel republication and declared appellant's claim forever barred. Appeal No. 13308 is from this order.

Appellant's primary contention is that the publication of notice to creditors is insufficient under constitutional standards of procedural due process. Thus, we are asked to reverse the lower court's decisions in both the civil and probate proceedings. For reasons hereinafter set forth, we reject appellant's contention, and affirm the decisions below.

In an estate proceeding, if the district court determines that the gross value of the estate does not exceed \$60,000, the court may order summary administration of the estate. NRS 145.040. When summary administration is ordered, as in the present case, notice to creditors of the appointment of an executor or administrator must be published. NRS 145.050. In addition, NRS 145.060 requires creditors of the estate to file their claims "within 60 days after the first publication of the notice to creditors." NRS 145.060 further provides: "Any claim which is not filed within the 60 days, shall be barred forever." It was based upon this latter provision that the district courts denied appellant's motions.

Appellant concedes that the notice to creditors complied with the statutory requirements of NRS 145.050. Appellant also admits that it received notice of Oliver's death on December 3, 1981, which was the last day to file claims. It is nonetheless contended that mere compliance with the statutory notice provision does not satisfy the due process requirements of the constitution. We do not agree.

It is the policy of the law of Nevada with respect to summary administration of estates to provide an expeditious and comparatively unencumbered means of accomplishing estate administration. Such a policy is reasonable considering the size of estates within the purview of NRS ch. 145. It is therefore consistent with the policy of the law governing such estates that notices to creditors are somewhat circumscribed. If the cost of newspaper publication exceeds \$25, the court is vested with power to authorize some other less costly means of providing notice.¹ In addition, the nonclaim period is reduced from 90 to 60 days from the date of first publication of notice and there is no "savings" provision which would exculpate creditors who proved lack of notice as provided by the statute.² We thus see a balancing of the interests of a decedent's heirs, devisees and legatees in the summary administration of their decedent's estates and the interests of creditors and claimants who seek access to the assets of such an estate.

The leading case on the requirements of due process in giving notice of a pending legal proceeding is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In *Mullane*, the following general principle was expressed:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pending of the action and afford them an opportunity to present their objections . . .

¹NRS 145.050(2).

²In contrast to creditors in estates under summary administration, creditors filing claims in large estates enjoy a "savings" provision in the event of a late filing. NRS 147.040(2).

We conclude that under all the circumstances here present, published notice pursuant to NRS 145.050 was reasonably and sufficiently calculated to provide actual notice to appellant. The statute is quite clear and specific in regard to notice requirements. Furthermore, appellant did actually receive notice within the 60 day period, albeit on the last day for filing claims, as contemplated by the statute.

Having concluded that NRS 145.050 does satisfy due process requirements, we now turn to the lower court's determination that appellant's claim was forever barred under NRS 145.060. The latter statute clearly mandates that all claims be filed within 60 days or be barred forever. We have previously held that Nevada statutes relating to the filing of claims are designed to foster the efficient and expedient administration of estates, and where the statute is plainly written, it should be enforced in accordance with its terms. *Gardner Hotel Sup. v. Estate of Clark*, 83 Nev. 388, 432 P.2d 495 (1967). Therefore, the district court did not err in barring appellant's claim despite the resultant hardship. As we stated in *Klosterman v. Cummings*, 86 Nev. 684, 687, 476 P.2d 14 (1970): "Whenever the legislature enacts a statutory bar to an action someone at some time may suffer. We cannot judicially legislate to alleviate a harsh result occasioned by a legislative enactment."

Accordingly, the orders of the lower courts are affirmed.

/s/ GUNDERSON, C.J.

/s/ MANOUKIAN, J.

/s/ MOWBRAY, J.

/s/ STEFFEN, J.

/s/ FONDI, D.J.³

³The Governor designated the Honorable Michael E. Fondi, District Judge, of the First Judicial District Court, to sit in the place of the Honorable Charles E. Springer, who voluntarily disqualified himself. Nev. Const. Art. 6, § 4.

Attest: A full, true and correct Copy.
C. R. Davenport, Clerk of the Supreme Court.

By Judith Fountain Deputy.

APPENDIX G

145.050 Regular proceedings and notices dispensed with: Exceptions; notice to creditors.

1. The order for a summary administration of the estate shall:

(a) Dispense with all regular proceedings and further notices, except for the notice to creditors of the appointment of the executor or administrator and notice of application for attorneys' fees.

(b) Provide that an inventory and appraisalment or record of value be made and returned to the court.

2. The notice to creditors of the appointment of the executor or administrator shall be given by publication if the cost does not exceed \$25, in a newspaper printed in the county where the proceedings are pending, if there is such a newspaper; if not, then in one having general circulation in the county. If the cost of publication will exceed \$25, the notice shall be given in such manner as the court may require.

3. If a notice to creditors of the appointment of the executor or administrator is published in a weekly newspaper, the notice must appear therein on a total of three dates of publication; and if in a newspaper published more often than once a week, the notice shall be so published that there will be at least 10 days from the first to the last dates of publication (both first and last days being included) and at least three issues during this period.

4. The notice to creditors shall be substantially in the following form:

Notice to Creditors

Notice is hereby given that the undersigned has been duly appointed and qualified by the (giving the title of the court and the date of appointment), as executor or administrator (as the case may be) of the estate of....., deceased. All creditors having claims against the estate are required to file the same, with proper vouchers attached, with the clerk of the court, within 60 days after the first publication of this notice.

Date

[Part 308:107:1941; 1931 NCL § 9882.308]—(NRS A 1971, 1163, 1975, 1770; 1977, 108)

No. 82-1365

Office - Supreme Court, U.S.

FILED

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONTINENTAL INSURANCE COMPANY,
Petitioner,

VS.

SISTER RICCARDA MOSELEY, EXECUTRIX OF THE
ESTATE OF AUDRAIN MAVIS-MARIE OLIVER,
Respondent.

CONTINENTAL INSURANCE COMPANIES,
Petitioner,

VS.

JEAN HOOPER STEVENS and AUDREY OLIVER,
Respondents.

On a Writ of Certiorari to the
Supreme Court of Nevada

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

I

This is not an appropriate case for review on Writ of Certiorari since there are no special and important reasons therefore, the Supreme Court of the State of Nevada has not decided an important question of Federal Law which

has not been, but should be, settled by this Court, nor has it decided a Federal Question in a way in conflict with applicable decision by this Court.

II

The Nevada statutory provision for notice to creditors in a probate proceeding where summary administration has been ordered is a legislative procedural enactment which satisfies the due process requirements of the Constitution.

III

Petitioner has no standing to raise the question of the adequacy of notice in the probate proceeding because it had actual notice of that proceeding before the time for filing claims had expired.

STATEMENT OF THE CASE

The record which was before the Supreme Court of the State of Nevada is not before this Court. Petitioner's statement of the case with reference to that record should be disregarded. The facts are set forth in the Nevada Supreme Court Opinion (Appendix F of the Petition; *98 Nev Ad Op 142; 653 P2d 158*).

ARGUMENT

The Nevada statutes in question provide for summary administration of estates that do not exceed Sixty Thousand Dollars (\$60,000.00) in gross value. They provide for publication of notice to creditors and any claim not filed within 60 days after the first publication of notice to creditors is barred forever. (The statutes in question are set forth in the Appendix hereto).

The Nevada Nonclaim Statute is not unique. Similar or identical statutes governing probate matters have been enacted in other states and the notice provisions uniformly upheld by the highest courts of those states. As examples see *Kuakini Hospital and Home v. Yamanoha* (Hawaii) 363 P.2d 1006, *Barrette v. Whitney* (Utah) 106 P.2d 522, *Latham v. McClenny* (Arizona) 285 P.2d 684 and *Everett v. Wing* (Vermont) 156 Atl. 393.

The cases uniformly hold that in determining whether due process of law has been denied regard must always be had to the character of the proceeding involved. A probate proceeding is not a controversy between named claimants, but is a legislative method devised to provide an expeditious and comparatively unencumbered means of accomplishing estate administration. No process is issued against anyone in such a proceeding, but all persons who might have an interest in the estate are constructively notified by the publication of notice. It is within the province of the various state legislatures to establish the procedure in such proceedings.

The writer can find no cases which hold that knowledge of a possible claim on the part of an executor or administrator, by itself, excuses filing of that claim.

The case most heavily relied on by Petitioner is *Mullane v. Central Hannover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. In that case the court speaking of due process requirements said:

"The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, *having reference to the subject with which the statute deals.*"

The Mullane case is not in point since it involved the adequacy of published notice by a trustee administering a trust for the benefit of named beneficiaries whose interests and addresses were known. Published notice as to those beneficiaries was held to be inadequate, however, the court said published notice was satisfactory as to beneficiaries whose interests or addresses were unknown to the trustee.

To impose a requirement that an executor or administrator must give personal notice to each creditor of the estate known to him would defeat the policy of the law that efficient and expedient administration of estates is essential. It would subject estates to endless litigation from creditors claiming they were entitled to the special treatment.

Finally, and probably of most significance, Petitioner has no standing to complain of the adequacy of notice in this proceeding since it had actual notice of the proceeding before the time for filing claims expired. It was through its own indifference, carelessness, and dilatory attitude that its claim was denied.

It is respectfully submitted that the petition should be denied.

Dated this 26th day of April, 1983.

COOKE, ROBERTS & REESE, LTD.

THOMAS A. COOKE
Counsel for Respondents

Appendix
Nevada Revised Statutes

145.010 Application of chapter. The provisions of this chapter shall apply only to estates of which summary administration shall be ordered.

[Part 308:107:1941; 1931 NCL § 9882.308]

145.020 Contents of petition seeking summary administration. All proceedings taken under this chapter, whether or not the decedent left a will, shall be originated by a petition for letters testamentary or letters of administration containing:

1. A specific description of all of the decedent's property.
2. A list of all the liens and encumbrances of record at the date of his death.
3. An estimate of the value of the property.

[Part 308:107:1941; 1931 NCL § 9882.308]

145.049 Notice of hearing of petition. Notice of hearing of the petition shall be given to the decedent's heirs, devisees and legatees as provided in NRS 155.010.

[Part 308:107:1941; 1931 NCL § 9882.308]—(NRS A 1975, 1770)

145.040 When summary administration may be ordered. When it is made to appear to the court or judge, by affidavit or otherwise, that the gross value of the estate does not exceed \$60,000, the court or judge may, if deemed advisable considering the nature and character of the estate

and the obligations thereof, make an order for a summary administration of the estate.

[Part 308:107:1941; 1931 NCL § 9882.308]—(NRS A 1965, 172; 1973, 431; 1975, 1770)

145.050 Regular proceedings and notices dispensed with: Exceptions; notice to creditors.

1. The order for a summary administration of the estate shall:

(a) Dispense with all regular proceedings and further notices, except for the notice to creditors of the appointment of the executor or administrator and notice of application for attorneys' fees.

(b) Provide that an inventory and appraisement or record of value be made and returned to the court.

2. The notice to creditors of the appointment of the executor or administrator shall be given by publication if the cost does not exceed \$25, in a newspaper printed in the county where the proceedings are pending, if there is such a newspaper; if not, then in one having general circulation in the county. If the cost of publication will exceed \$25, the notice shall be given in such manner as the court may require.

3. If a notice to creditors of the appointment of the executor or administrator is published in a weekly newspaper, the notice must appear therein on a total of three dates of publication; and if in a newspaper published more often than once a week, the notice shall be so published that there will be at least 10 days from the first to the last

dates of publication (both first and last days being included) and at least three issues during this period.

4. The notice to creditors shall be substantially in the following form :

Notice to Creditors

Notice is hereby given that the undersigned has been duly appointed and qualified by the (giving the title of the court and the date of appointment), as executor or administrator (as the case may be) of the estate of, deceased. All creditors having claims against the estate are required to file the same, with proper vouchers attached, with the clerk of the court, within 60 days after the first publication of this notice.

Date

[Part 308:107:1941; 1931 NCL § 9882.308]—(NRS A 1971, 1163; 1975, 1770; 1977, 108)

145.060 Creditors' claims; Filing, approval and payment.

1. Creditors of the estate must file their claims, due or to become due, with the clerk, within 60 days after the first publication of the notice to creditors of the appointment of the executor or administrator, and within 10 days thereafter the executor or administrator must act on the claims filed and present them in 3 days thereafter to the judge for his action.

2. Any claim which is not filed within the 60 days shall be barred forever.

3. Every claim which is filed as provided in this section, allowed by the executor or administrator, and approved by the judge, shall then, and not until then, be ranked as an acknowledged debt of the estate and be paid in due course of administration except that advance payment of small debts may be made pursuant to subsection 2 of NRS 150.230.

[Part 308:107:1941; 1931 NCL § 9882.308]—(NRS A 1975, 1771)